



FH
[REDACTED]

**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

MGE/161685

PRELIMINARY RECITALS

Pursuant to a petition filed October 31, 2014, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Kenosha County Human Service Department in regard to Medical Assistance (MA), a telephonic hearing was held on December 09, 2014.

The issue for determination is whether the agency correctly determined the petitioner's trust was an available asset that placed her over the Institutional MA asset limit.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: No Appearance

Kenosha County Human Service Department
8600 Sheridan Road
Kenosha, WI 53143

ADMINISTRATIVE LAW JUDGE:

Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Kenosha County.
2. On September 18, 2014, petitioner applied for Institutional MA.

3. On October 21, 2014, the agency found the petitioner ineligible for Institutional MA after determining that the assets in a trust were available for her care and therefore she was over the asset limit for MA.
4. On April 5, 1999, the petitioner and her husband used their assets to set up a revocable trust. See Exhibit 4.
5. The petitioner's trust contains over \$2,000 in assets, last valued at \$115,163.76. See Exhibit 2.

DISCUSSION

A person is ineligible for medical assistance if her available assets exceed \$2,000. Wis. Adm. Code, §DHS 103.06(1)(a); Wis. Stat. §49.47(4)(b)3g. Wis. Stat. §49.454, determines how trusts affect medical assistance eligibility. Its provisions apply "if assets of the individual or the individual's spouse were used to form all or part of the corpus of the trust" and the trust was set up by the individual, her spouse, or someone acting on the individual's behalf or request. Wis. Stat. §49.454(1)(a). All revocable trusts covered by the statute are available; irrevocable trusts covered by the statute are available "[i]f there are circumstances under which payment from an irrevocable trust could be made to or for the benefit of the individual" seeking or receiving medical assistance. Wis. Stat. §49.454(2) and (3). This statute derives its authority from 42 USC §1396p(d), a similar federal statute.


These statutes set the basis then for the policy set forth by the agency in determining that petitioner's trust was an available asset. *Medicaid Eligibility Handbook*, §16.6.4.2, provides as follows:

Trust Established With Resources of the Individual or Spouse

If the resources of the individual or the individual's spouse were used to form all or part of the principal of the trust, some or all of the trust principal and income may be considered a non-exempt asset, available to the individual. If there are any circumstances under which payment from the trust could be made to or for the benefit of the individual at any time no matter how distant, the portion of the principal from which, or the income on the principal from which, payment to the individual could be made shall be considered non-exempt assets, available to the individual.

This treatment applies regardless of:

- the purpose for which a trust is established;
- whether the trustees have or exercise any discretion under the trust;
- any restrictions on when or whether distributions may be made from the trust; **or**,
- any restrictions on the use of distributions from the trust.

Example 1: Doug is a 65 year old Medicaid applicant. Several years ago, Doug transferred his life savings of \$60,000 to an irrevocable trust, naming himself as the beneficiary. Doug's brother, Jim was appointed as the trustee. Under the terms of the trust, Jim could disburse up to \$10,000 annually, from either trust principal or trust income, either directly to Doug or indirectly to provide some benefit for Doug. The trustee had sole discretion as to when and how these trust disbursements would be made, but under no circumstance could they exceed \$10,000 in a 12 month period. Because the entire corpus  (principal of the fund) could eventually be distributed, \$60,000 would be considered an available non-exempt asset for Doug's Medicaid eligibility determination, even if the trustee decides not to make any actual disbursements.

Example 2: Al is a 65 year old Medicaid applicant. Six years ago, Al sold his farm for \$300,000 and put the entire proceeds from the sale into an irrevocable trust, naming himself as the beneficiary. Al's friend, Scott was appointed as the trustee. Under the

terms of the trust, Scott could disburse any amount of trust principal or trust income, at any time, either directly to Al or indirectly to provide some benefit for Al. The trustee had sole discretion as to when and how disbursements would be made as well as the amount that could be disbursed. Therefore \$300,000 would be considered an available non-exempt asset for Al's Medicaid eligibility determination, even if the trustee never makes an actual disbursement.

Example 3: Dave is a 65 year old Medicaid applicant who won a \$250,000 lottery several years ago and put the entire amount into an irrevocable trust, naming himself as the beneficiary. Dave appointed his brother Don as the trustee. Under the terms of the trust, none of the trust principal could ever be distributed to Dave during his lifetime. Don could only distribute the income that is produced by the trust to his brother Dave, and Don has sole discretion as to whether or not any income is actually distributed.

The trust principal would be an unavailable asset since the terms of the trust prohibit any distribution of trust principal during Dave's lifetime. Any disbursements of trust income to Dave would be counted as income to Dave in the month of receipt. Because Don has the authority to distribute all of the income, any trust income which is not disbursed by Don, but instead remains in the trust, is considered to be an available asset.

MEH, §16.6.4.2, available online at <http://www.emhandbooks.wisconsin.gov/meh-ebd/meh.htm>.

The policy is meant to follow the intent of the law which requires that a nursing home resident use her own money for her medical care before requiring the state and its taxpayers to do so. Because the language of the petitioner's trust includes circumstances under which payment can be made for her benefit, it is an available asset regardless of what the remaining language states. The petitioner's assets exceed \$2,000 when the trust is considered an available asset. This means that the agency correctly found her ineligible for medical assistance.

I add, assuming petitioner and her representatives find this decision unfair, that it is the long-standing position of the Division of Hearings & Appeals that the Division's hearing examiners lack the authority to render a decision on equitable arguments. See, Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 433 F.Supp. 540, 545 (E.D. Wis.1977). This office must limit its review to the law as set forth in statutes, federal regulations, and administrative code provisions.

CONCLUSIONS OF LAW

The agency correctly determined the petitioner's trust was an available asset that placed her over the medical assistance asset limit for Institutional MA.

THEREFORE, it is

ORDERED

The petition for review herein is dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN

INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 12th day of January, 2015

\sKelly Cochrane
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on January 12, 2015.

Kenosha County Human Service Department
Division of Health Care Access and Accountability